Vinson&Elkins

Daniel L. Porter dporter@velaw.com
Tel 202.639.6530 **Fax** 202.879.8803

January 16, 2007

Ms. Susan H. Kuhbach
Senior Office Director for Import Administration
Room 1870
Department of Commerce
14th Street and Constitution Avenue, NW
Washington, DC 20230

Re: Application of the Countervailing Duty Law To Imports from the People's Republic of China:
Request for Comments (71 FR 75505, December 15, 2006)

Dear Ms. Kunbach:

These comments are filed on behalf of the Bureau of Fair Trade for Imports and Exports (BOFT) of the Ministry of Commerce of the People's Republic of China concerning whether the countervailing duty ("CVD") law should be applied to imports from China in light of its designation by the Department of Commerce (DOC) as a non-market economy. These comments are submitted in response to the DOC's request for comments published in the *Federal Register* on December 15, 2006.

The comments are provided in the attached paper. In accordance with the Department's request, we also enclose a CD-ROM containing an electronic version of the enclosed comments.

Please do not hesitate to contact the undersigned should you have any questions concerning the enclosed comments.

Respectfully submitted,

William H. Barringer
Daniel L. Porter
Valerie Ellis
Matthew P. McCullough
Yu Li

Before the United States Department of Commerce
International Trade Administration

Whether The Countervailing Duty Law Should Be Applied To Imports from China:

Comments of the Bureau of Fair Trade for Imports and Exports of the Ministry of Commerce, the People's Republic of China

William H. Barringer
Daniel L. Porter
Valerie Ellis
Matthew P. McCullough
Yu Li

Vinson & Elkins L.L.P.
1455 Pennsylvania Avenue N.W.
Washington, D.C. 20004
(202) 639-6500

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INTRODUCTION AND SUMMARY

These comments are filed on behalf of the Bureau of Fair Trade for Imports and Exports (BOFT) of the Ministry of Commerce of the People's Republic of China concerning whether the countervailing duty ("CVD") law should be applied to imports from China in light of its designation by the Department of Commerce (DOC) as a non-market economy. These comments are submitted in response to the DOC's request for comments published in the *Federal Register* on December 15, 2006.

BOFT cites seven distinct legal bases which prevent DOC from applying the CVD law to China as long as it continues to treat China as an NME:

I. The Commerce Department does not have the legal authority to initiate a countervailing duty investigation against china as long as China is designated a non-market economy country.

II. Even if it has statutory authority, the Commerce Department has created a binding rule not to apply the countervailing duty law against non-market economy countries and such binding rule cannot be amended without first complying with the rulemaking procedures of the Administrative Procedure Act (APA).

III. Application of countervailing duties to China, while continuing to treat it as an NME for antidumping purposes, will result in impermissible double counting of domestic subsidies.

IV. Given that the Commerce Department has taken the position that it is impossible to calculate subsidy benefits in NME countries, it should not proceed in applying the countervailing duty law to countries it has designated as NME's, including China, unless it can overcome this impossibility.

V. The CFS paper investigation must be terminated because any change to the department's 20 year approach can only be applied prospectively.

VI. The manner in which DOC has solicited comments on this issue violates the procedural protections embodied in the Tariff Act of 1930.

VII. Absent new regulations, initiation of a CVD investigation against an NME country violates article 14 of the WTO Agreement on Subsidies and Countervailing Measures.

Individually and in combination, each of these points requires DOC to 1) await Congressional action before applying the CVD laws to non-market economies; 2) to promulgate new CVD regulations applicable to non market economies in the event that such statutory authority is granted; 3) to immediately rescind the ongoing CVD investigation of CFS paper, and 4) to refuse to initiate any future CVD petitions filed against non-market economy countries until the relevant statutory and regulatory amendments have been made.

COMMENTS

I. THE COMMERCE DEPARTMENT DOES NOT HAVE THE LEGAL AUTHORITY TO INITIATE A COUNTERVAILING DUTY INVESTIGATION AGAINST CHINA AS LONG AS CHINA IS DESIGNATED A NON-MARKET ECONOMY COUNTRY

At the outset BOFT notes that it is remarkable that DOC would initiate a CVD investigation against a country it has designated a non-market economy when both legal precedent and the statute itself provide no such authority. Even more remarkable is the fact that DOC has done so without establishing, in the words of the Department itself, "whether the countervailing duty law should now be applied to imports from the PRC." *Application of the Countervailing Duty Law to Imports From the People's Republic of China: Request for Comments*, 71 Fed. Reg. 75507 (Dec. 15, 2006). BOFT submits that such action is not the way trade remedy investigations are supposed to be conducted.

BOFT submits that there is little question that DOC does not have the legal authority to apply the CVD law to countries, such as China, that DOC continues to designate as non-market economy countries.

A. The Department of Commerce's Initiation Of A Countervailing Duty Investigation Against China When China Continues To Be Designated A Non-Market Economy Violates Controlling Precedent.

1. The Court of Appeals for the Federal Circuit has definitively ruled that the countervailing duty law was not intended to be applied against NMEs.

The Court of Appeals for the Federal Circuit (CAFC) has ruled that the CVD law may not be applied to imports from NME countries. *Georgetown Steel*, 801 F.2d 1308 (Fed. Cir. 1986).

The court of appeals reached this conclusion after a very thoughtful and comprehensive analysis of the purpose of the statute and Congress' own treatment of the statute through legislative action. *Georgetown Steel* demonstrates that only one reasonable interpretation of the statute remains consistent with the overarching regulatory scheme enacted by Congress to deal with "unfair" imports from non-market economy countries. The holding does not reflect any deference to the expertise of the administering agency in interpreting the statute – although at that time DOC had consistently considered and rejected the notion that the CVD law could apply to non-market economies – but rather the CAFC's own careful analysis of: (i) the statutory language; (ii) Congressional action (and inaction); (iii) the presence of other provisions to address "unfair" imports from NMEs; and (iv) the impracticality of investigating subsidies in NME countries.

a. Statutory language

With respect to the statute, the CAFC concluded that the history surrounding the U.S. statute governing countervailable subsidies confirmed that it was not intended to address non-market economies. The court stated:

> In its relevant terms, section 303 is substantially unchanged from the first general countervailing duty statute Congress enacted as section 5 of the Tariff Act of July 24, 1897. At the time of the

> original enactment there were no nonmarket economies; Congress therefore had no occasion to address the issue before us.

801 F.2d at 1314. In light of these origins, the court refused to accept the "broadest possible" interpretation of the statute to find an intent by Congress to "cover as many beneficial acts [for the exporter] as possible." *Id.* The statute had a narrower scope.

b. Congressional action

The CAFC also highlighted the fact that section 303 of the Tariff Act had been reenacted by Congress on several occasions, but never changed to move beyond the basic foundation of the provision as crafted in 1897:

> Since that time Congress has reenacted section 303 six times, without making any changes of significance to the issue before us. . . That fact itself strongly suggests that Congress did not intend to change the scope or meaning of the provision it had first enacted in the last century.

Id. at 1314 (internal citation omitted). The court could not discern any legislative intent to alter the long-standing statutory scheme.

c. Presence of other trade provisions to address unfair imports from NME countries

Perhaps most importantly, the court found support for its conclusion in the fact that "Congress on several occasions in other statutes specifically dealt with exports from nonmarket economies." *Id.* According to the court:

> Those statutes indicate that Congress intended that any selling by nonmarket economies at unreasonably low prices should be dealt with under the antidumping law. There is no indication in any of those statutes, or their legislative history, that Congress intended or understood that the countervailing duty law would apply.

Id. at 1316. The court proceeded to discuss the implementation of the non-market economy provisions of the antidumping law, successive legislative history regarding those provisions, and

any other legislative history concerning amendments to the countervailing duty law. *Id.* at 1316-18. Based on a review of all the amendments and legislative history, the court concluded:

> **Congress . . . has decided that the proper method for protecting the American market against selling by nonmarket economies at unreasonably low prices is through the antidumping law**. . . . If that remedy is inadequate to protect American industry from such foreign competition – a question we could not possibly answer – it is up to Congress to provide any additional remedies it deems appropriate.

Id. at 1318 (emphasis added). The court did not equivocate on this fundamental issue.

d. Impractical to investigate subsidies in NME countries

Finally, the court placed all its analysis of the statute and legislative history in the broader context of the purpose of the countervailing duty law and the nature of non-market economies. The court found that in enacting the countervailing duty law Congress intended to address "unfair competition" driven by subversion of the market process and the misallocation of resources in a market economy setting. *Id.* at 1315. It concluded, however, that:

> In exports from a nonmarket economy . . . this kind of "unfair" competition cannot exist. Although a nonmarket state may engage in foreign trade through various entities, the state controls those entities and determines where, when and what they will sell, and at what prices and upon what terms.
>
> . . .
>
> Unlike the situation in a competitive market economy, the economic incentives the state [provides to exporting entities do] not enable those entities to make sales in the United States that they otherwise might not have made. Even if one were to label these incentives as a "subsidy," in the loosest sense of the term, the governments of those nonmarket economies would in effect be subsidizing themselves. **[This is not] the kind of "bounty" or "grant" for which Congress in section 303 prescribed the imposition of countervailing duties**.

Id. at 1315. In essence, the court described the futility of even attempting to measure the unfair advantage conferred in a non-market economy through the countervailing duty law. It simply made no logical sense. The court concluded:

> Based upon the purpose of the countervailing duty law, the nature of nonmarket economies and the actions Congress has taken in other statutes that specifically address the question of exports from those economies, we conclude that the economic incentives and benefits that [bestowed in nonmarket economies] do not constitute bounties or grants under section 303 of the Tariff Act of 1930, as amended.

Id. at 1314.

The logic and language of the CAFC's decision is unequivocal. The Court's decision was a binding interpretation of the law, not just a simple affirmation of DOC's practice at that time.

2. Legislative action since *Georgetown Steel* confirms this case remains a controlling precedent

The Supreme Court has held that Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change or where it incorporates sections of a prior law into new law. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Curran*, 456 U.S. 353, 383 n.66 (1982) (quoting *Lorillard, A Division of Loew's Theaters, Inc. v. Pons*, 434 U.S. 575, 580 (1978)). Through a failure to act, Congress may also acquiesce to judicial or administrative interpretation of a law, particularly when the issue involved is significant or controversial. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000); *Bob Jones University v. United States*, 461 U.S. 574, 601 (1983).

Moreover, "the normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent

specific." *Midatlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986) (citing *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979)). This rule of statutory construction has added force where the proposed change involves altering the fundamental details of a regulatory scheme. *See Gonzalez v. Oregon,* 126 S. Ct. 904, 921 (2006) (citing *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001), and *Brown & Williamson Tobacco*, 529 U.S. at 160).

These fundamental rules of statutory construction apply fully to this case. Since *Georgetown Steel*, Congress has on more than one occasion amended the antidumping and countervailing duty laws, including significant amendments made as part of the 1988 Trade Act, and the Uruguay Round Agreement Act . On each occasion, Congress embraced – either directly or indirectly – the *Georgetown Steel* holding.

a. The 1988 Omnibus Trade and Competitiveness Act

Two years after *Georgetown Steel*, Congress revisited the issues of antidumping and countervailing duties. Title I, Subtitle C, Part 2 of the 1988 Trade Act, covering sections 1311 – 1337, was entitled "Improvement in the Enforcement of the Antidumping and Countervailing Duty Laws." 1988 Trade Act, 102 Stat. at 1184. Section 1312 of the 1988 Trade Act defined "Actionable Domestic Subsidies," and merely confirmed that the term "subsidy" as defined by that provision "has the same meaning as the term 'bounty or grant' as that term is used in section 303." It then provided an illustrative list of actionable subsidies. *Id.* at 1184-85. In other words, Congress left section 303 of the Tariff Act of 1930 undisturbed for a seventh time. Other subsidy provisions contained in the 1988 Trade Act concerning agricultural products and international consortia, 1988 Trade Act, §§ 1313-15, 102 Stat. at 1185-86, did not otherwise address non-market economies. On the other hand, Congress continued to tinker with the non-market economy provisions of the antidumping law, enacting a number of amendments to

section 773 of the Tariff Act of 1930. 1988 Trade Act, § 1316, 102 Stat. at 1186-88. In short, Congress left unchanged the basic legal framework of no application of CVD's to NMEs and special rules for NMEs under the antidumping law to deal with unfair imports from NMEs.

More importantly, the legislative history confirms that Congress understood the *Georgetown Steel* decision to be the prevailing law, including its holding that the countervailing law does not apply to non-market economies. The House Ways and Means Committee in April 1987 considered House Bill 3, the predecessor to House Bill 4848 that ultimately became law on August 23, 1988 under the same short title "Omnibus Trade and Competitiveness Act of 1988."[1] In fact, H.R. 3 was itself passed by the House and Senate in April 1988 under the short title "Omnibus Trade and Competitiveness Act of 1988," only to be vetoed by President Reagan in May 1988 and sent back to Congress for further deliberation. *See* Message from the President of the United States Transmitting His Veto of H.R. 3, A Bill to Enhance the Competitiveness of American Industry, and for Other Purposes, 100th Cong., 2d Sess., H.R. Doc. 100-200 (1988). In most respects, H.R. 3 and H.R. 4848 were identical bills. Of particular relevance, the antidumping and countervailing duty provisions of both bills as passed by Congress were identical. *Compare* 1988 Trade Act, §§ 1311-37, 102 Stat. at 1184-1211 *and* Conference Report to Accompany H.R. 3, H.R. Rep. No. 100-576, §§ 1311-37, at 83-112 (1988) (Conf. Rep.).

Earlier action on H.R. 3, however, is very telling. As reported by the House Ways and Means Committee, section 157 of H.R. 3 would have amended both sections 303 and 701 of the Tariff Act of 1930. According to the Committee, these amendments would:

> [P]rovide for the application of the countervailing duty law to non-market economy countries *to the extent that* a subsidy can

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[1] For a complete summary of the legislative action on H.R. 3, 100th Cong. (1987), **and H.R. 4848, 100th Cong. (1988), see XLIV 1988 Congressional Quarterly Almanac 209-22 (1989).

> reasonably be identified and measured by the administering authority. **The provision is intended to allow the administering authority discretion in determining, on a case-by-case basis, whether a particular subsidy can, as a practical matter, be identified and measured in a particular non-market economy country.**

H.R. Rep. No. 100-40, pt. 1, at 138 (1987) (emphasis in bold added).

By this statement, the House Ways and Means Committee, which has specific jurisdiction over trade legislation, recognized that the DOC did not already have legal authority to apply the countervailing duty law to non-market economies, and that an explicit act of Congress was needed to create this authority. The reason for this action was made explicit in the Committee report:

> In a recent court case . . . the U.S. Court of Appeals for the Federal Circuit upheld the Department of Commerce's refusal to apply the countervailing duty law in two investigations of carbon steel wire rod imports from Poland and Czechoslovakia, **by holding that the countervailing duty law does not apply to non-market economy countries.**

Id. (emphasis added) (citing *Georgetown Steel*). Thus, the House Ways and Means Committee unambiguously stated that DOC did not have discretion to apply the countervailing duty law to non-market economies because the CAFC had held that the countervailing duty law to be inapplicable to non-market economies. An explicit act of Congress was required to change the law.

Congress dropped the language of section 157 from the final version of H.R. 3 that passed the House and Senate. *See generally* H.R. Rep. No. 100-576 (Conf. Rep.) . Thus, the legislative history of the 1988 Trade Act unequivocally shows that Congress specifically understood that the existing countervailing duty law did not apply to non-market economies, but declined to change the law.

b. The Uruguay Round Agreements Act

The URAA implemented the trade agreements concluded in the Uruguay Round of multilateral trade negotiations. Title II of the Act amends the U.S. antidumping and CVD laws to implement the WTO agreements. *See* S. Rep. No. 103-412, at 6-7 (1994). These amendments included eight major changes to the U.S. antidumping law and six major changes to the U.S. CVD law. *Id.* at 7.

Notwithstanding these significant changes to the CVD law, Congress declined to make any changes to address the non application of the CVD law to non-market economies. Indeed, Congress not only did not change the law, it reaffirmed the finding in *Georgetown Steel* by adopting the Statement of Administrative Action ("SAA") accompanying the legislation which explicitly reaffirmed the decision in *Georgetown Steel*, namely that the CVD law does not apply to non-market economies. *See* Statement of Administrative Action, H.R. Doc. No. 103-316, pt. 1, at 926 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4240.[2] Thus, the same principles of reenactment and acquiescence should apply; *Georgetown Steel* remains binding precedent.

Although the URAA repealed section 303 of the Tariff Act of 1930, that simple repeal and passage of a new statutory provision under section 701 of the Act in no way altered the scope of the application of the statute. The relevant change in the statute simply replaced the term "bounty or grant," with the term "countervailable subsidy," which was defined in the URAA and became new section 771(5) of the Tariff Act of 1930, as amended. However, both the Executive and Congress expressed their position that the definition of "countervailable subsidy" contained in new section 771(5) would "have the same meaning that administrative

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[2] The SAA is expressly incorporated into the U.S. Code by Congress as "an authoritative expression by the United States concerning the interpretation and application of the [URAA]." 19 U.S.C. § 3512(d). Section 3511(a)(2) also indicates that "Congress approves . . .the statement of administrative action." 19 U.S.C. § 3511(a)(2).

practice and courts have ascribed to the term 'bounty or grant' and 'subsidy' under prior versions of the statute." H.R. Doc. No. 103-316 at 925, 1994 U.S.C.C.A.N. at 4238. For purposes of the analysis in *Georgetown Steel*, there was no change in the scope of the statute. Indeed, section 771(5) of the Tariff Act of 1930 makes no reference to non-market economies.

In sum, the legislative history confirms that Congress did not intend to alter the non-application of the CVD law to non-market economies, as previously enacted by Congress and confirmed by the CAFC. Given this legislative history, such intent cannot be presumed. "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Whitman*, 531 U.S. at 468 (citing *MCI Telcomms. Corp. v. AT&T*, 512 U.S. at 231 and *Brown & Williamson Tobacco Corp.,* 529 U.S. at 159-60).

The attempt by DOC to extend the CVD law to non-market economies would constitute a trade remedy elephant. Such an action would have enormous economic and political significance, opening up a whole new class of trade action against some of the United States' largest trading partners. Congress cannot be deemed to have taken such action through statutory language devoid of any reference to non-market economies. "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160. Rather, the legislative history confirms that Congress has continued to reaffirm the basic statutory approach under which imports from non-market economy countries would be addressed through the antidumping law, not the countervailing duty law.

3. The Department of Commerce may not ignore controlling precedent

DOC may not ignore well-established law. Congress, by repeatedly accepting the interpretation of the CAFC in *Georgetown Steel*, has spoken on the matter of the CVD law and

its non-applicability to non-market economies. This is a final pronouncement. Any interpretation offered by DOC must be judged against that settled law. *See Neal v. United States*, 516 U.S. 284, 295 (1996) ("Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law.").

What the Department now proposes in applying the CVD law to a country it has designated as an NME is completely inconsistent with settled law. There are no shades of gray to argue over. The application of the CVD law to NMEs is invalid on its face.

II. EVEN IF IT HAS STATUTORY AUTHORITY, THE COMMERCE DEPARTMENT HAS CREATED A BINDING RULE NOT TO APPLY THE COUNTERVAILING DUTY LAW AGAINST NON-MARKET ECONOMY COUNTRIES AND SUCH BINDING RULE CANNOT BE AMENDED WITHOUT FIRST COMPLYING WITH THE RULEMAKING PROCEDURES OF THE ADMINISTRATIVE PROCEDURE ACT (APA).

We submit that DOC lacks the statutory authority to initiate a CVD investigation against a country which it has designated as an NME. Even if DOC believed that the CAFC's decision in *Georgetown Steel* reflected only one permissible interpretation of the statute, and that other possible interpretations were available, DOC would still be prohibited from changing its approach without first complying with the rulemaking requirements of the Administrative Procedures Act (APA) because the current practice has been codified through rulemaking. *See, e.g., Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999).

The APA establishes a clear process that must be followed when agencies formulate, amend or repeal a rule. *See* 5 U.S.C. § 553(c) (opportunity to participate in the process); and *id.* § 551(5) (providing that rulemaking includes formulation, amendment or repeal of a rule). DOC is not exempt from this process when it engages in rulemaking. This Court has confirmed "the rights and duties of parties to antidumping and countervailing duty proceedings

before Commerce" do not fall into an excepted category under the APA. *Carlisle Tire & Rubber Co, v. United States*, 10 C.I.T. 301, 305, 634 F. Supp. 419, 423 (1986).

Because the exemption of NMEs from the application of the CVD law is a binding rule within the meaning of the APA, DOC must engage in a notice and comment period if it wishes to change the rule. Furthermore, the DOC cannot engage in this notice and comment period simultaneously with the initiation of a CVD case against China, because the initiation alone constitutes a retroactive revision to the rule, in violation of the APA.

A. The APA Requires Formal Rulemaking To Amend Binding Rules.

The APA defines a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). The APA requires the agency to publish a notice of rulemaking in the Federal Register, "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," and "incorporate in the rules adopted a concise general statement of their basis and purpose." *Id.* § 553(b), (c). Stated differently, when an agency issues a statement interpreting and answering a legal question, after a notice and comment period, it has created a rule. When an agency creates a rule, albeit through its own, properly-delegated authority, the agency must follow the rule it has made.

B. Because The Department Of Commerce Has Codified Its Refusal To Initiate Countervailing Duty Investigations Against NME Countries, It Is A Binding Rule As Defined In The APA.

The Commerce Department's long-held position that the CVD law does not apply to NME countries is more than a mere statement of policy or evolving agency interpretation. Rather, the repeated affirmation of this position over the past 20 plus years demonstrates that DOC has codified its refusal to apply the CVD law to NMEs, and, therefore, such refusal has become a binding rule as defined under the APA.

We detail the most important aspects of this rulemaking history below. We submit that a binding rule emerged in 1984 when DOC adopted its position after a specific notice and comment period. If this 1984 action does not meet the APA criteria, the Commerce Department's position later became a binding rule in 1993 upon issuance of the "General Issues Appendix" – a formal written statement that resolved various issues related to the CVD law in general. Finally, even if these first two actions are not sufficient, there can be no question that DOC codified its position when it specifically limited the scope of its authority in new CVD regulations to exclude non-market economies.

- *1983-1984*

In 1983, DOC initiated several investigations that raised the issue of whether a non-market economy can be subject to the CVD law. In one of these cases, Textiles, Apparel, and Related Products From the People's Republic of China, Commerce published a notice stating:

> In view of the novelty of issues raised by the petition, we invite written comments and participation in a conference to which *all persons* interested in these issues are invited.[3]

48 Fed. Reg. 46,600, 46,601 (Oct. 13, 1983) (emphasis added).

A few months later, after consideration of comments and arguments submitted in the various ongoing proceedings, including all comments submitted by the general public, DOC issued a determination in the countervailing duty case on Carbon Steel Wire Rod from Poland establishing that, "[b]ecause the notion of a subsidy is, by definition, a market phenomenon, it does not apply in a nonmarket setting." 49 Fed. Reg. 19,374, 19,376 (May 7, 1984). Shortly

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[3] No preliminary or final determination was reached in Textiles from China because the petition was eventually withdrawn and the case was terminated. However, the hearing and related briefs from the Textiles case were considered in the other pending CVD cases against NMEs. *See* e.g., Carbon Steel Wire Rod From Poland; Preliminary Negative Countervailing Duty Determination 49 Fed. Reg. 6768 (Feb. 23, 1984).

thereafter, in Potassium Chloride from the Soviet Union, the Department further clarified that because a non-market economy cannot confer subsidies, the agency would dismiss or refuse to initiate investigations based on subsidy petitions brought against NMEs. As Commerce explained,

> In light of our determination . . . that, **as a matter of law**, [subsidies] cannot be found in NMEs, it is apparent that the petition filed against imports of potassium chloride from the Soviet Union (an NME) does not allege elements necessary for the imposition of countervailing duties. The petition is, therefore, not a sufficient basis for an investigation.

49 Fed. Reg. at 23,428 (emphasis added).

- *1993*

Roughly ten years later, DOC once again affirmed its 1984 of when it can investigate subsidies under the CVD law in the seminal General Issues Appendix in Certain Steel Products from Austria, 58 Fed. Reg. 37,217 (July 9, 1993) ("General Issues Appendix"). The agency promulgated this "General Issues Appendix" by inviting all parties to comment on the issues raised therein, and by holding a separate hearing outside of the confines of the scope of the Austrian steel proceeding, on these general issues. *Id.* at 37,217 ("A public hearing regarding general issues . . . was held on May 5-6, 1993.").

The General Issues Appendix resolved and clarified various *general* issues related to the CVD law. Included in the General Issues Appendix was a specific reaffirmation of the rule regarding non-application of the CVD laws to NMEs. Specifically, in a section entitled "The Nature of Countervailable Benefits," the General Issues Appendix explained that:

> the CVD law is not applicable to nonmarket economies because the concept that the receipt of a subsidy constitutes a distortion in the normal allocation of resources has no meaning in such an economy . . . in a nonmarket economy, it is impossible to say that a producer has received a subsidy in the first place.

Id. at 37,261.

- *1998*

Perhaps most importantly, DOC explicitly adopted its rule against applying CVD law to NME's when it promulgated its long-awaited CVD regulations. Of particular relevance for this case, when initially published in 1997 the Proposed CVD Rules did not include a specific regulation concerning the definition of benefit. *See* Countervailing Duties: Notice of Proposed Rulemaking and Request for Public Comments, 62 Fed. Reg. 8818 (Feb. 26, 1997). However, when published some 21 months later, the final rule added a new subsection 351.503. As the Commerce Department explained at that time, "we have decided to codify a final rule on the concept of 'benefit.' This rule is now § 351.503." Countervailing Duties: Final Rule, 63 Fed. Reg. at 65,350. In providing a definitive interpretation of the new rule, Commerce further explained:

> In this regard, it is important to note here our practice of not applying the CVD law to non-market economies. The CAFC upheld this practice in *Georgetown Steel Corp. v. United States,* 801 F.2d 1308 (Fed. Cir. 1986). See also GIA at 37261. We intend to continue to follow this practice.

63 Fed. Reg. at 65,360.

The preamble to the Final CVD Rule has legal effect because it was promulgated in accordance with the APA requirement that all final rules include a "general statement of their basis and purpose." 5 U.S.C. § 553(c). As the D.C. Circuit has explained, the preamble to a final rule is what the court and public use to determine that the agency has done its job "in a manner calculated to negate the dangers of arbitrariness and irrationality in the formulation of rules." *Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968).

In the preamble to its final rule on countervailing duties, DOC is unequivocal; it will not apply the subsidy law to NME countries and it will not examine subsidy allegations

made against an NME country. Moreover, with respect to the definition of benefit, the language in the preamble makes explicit that the rule as currently codified at section 351.305 is simply not applicable to non-market economies. Once an agency has given its regulation a definitive interpretation, any subsequent change in that interpretation is effectively an amendment of the regulation, which the Commerce may not do without first engaging in APA notice and comment rulemaking. *Alaska Professional Hunters Ass'n* at 1034. Therefore, even if it were permissible under the statute for Commerce to revise its regulations such that the CVD could be applied to countries designated by Commerce to be NMEs, it is not permissible for Commerce to make this application prior to the final amendment of the applicable rules promulgated through established rulemaking procedures.

III. APPLICATION OF COUNTERVAILING DUTIES TO CHINA, WHILE CONTINUING TO TREAT IT AS AN NME FOR ANTIDUMPING PURPOSES, WILL RESULT IN IMPERMISSIBLE DOUBLE COUNTING OF DOMESTIC SUBSIDIES

Under current U.S. NME practice, normal value is constructed based on the factors of production of an NME respondent, which are valued based on a surrogate market economy value for each factor in addition to selling, general and administrative expenses. The surrogate value itself, based on DOC methodology, is a subsidy-free value.[4] As such, the normal value eliminates any distortions due to government interventions and/or subsidies in the NME by using a subsidy-free and distortion-free value in constructing normal value.

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[4] It is consistent with this principle that Commerce will not use market-economy inputs to value factors of production where it believes or suspects that the market economy prices may have been dumped or subsidized. Such Commerce Department practice reflects Congressional intent. When revising the special NME antidumping rules in 1988, Congress specifically instructed the Commerce Department to "avoid using any prices which it has reason to believe {were} subsidized." H.R. Conf. Rep. No. 100-576, at 590 (1988). In doing so, Congress intended for the NME methodology for calculating AD duties to fully address the distorting effect of subsidization.

For example, assume that a market-economy ("ME") respondent has received a low interest loan from the government. That low interest loan will reduce the cost to the respondent of borrowing money, thereby reducing its financial expenses and consequently, its total cost of producing the subject merchandise. That cost-savings would be passed on to all of the ME respondent's sellers in the form of lower prices. Under standard antidumping methodology for market-economy countries, margins of dumping are typically determined based on a comparison of prices in the home market with prices in the United States. Under the scenario described above, the price reduction caused by the loan subsidy would be reflected in both the home market and U.S. prices, so that any unfairly low price differential found for U.S. sales could be fairly attributed to "dumping" in the U.S. market. In other words, the prices in both the home and U.S. markets would be equally reduced by the effect of the subsidy – from an antidumping methodological perspective, it would be a wash.[5] Likewise, if a domestic industry wanted to address subsidization as well as dumping by a ME respondent, it would petition for and the government would impose a corresponding CVD rate to address the subsidy. No double-counting would occur.

The same result is not reached in an NME context. Using the scenario above, assume that the respondent is Chinese and normal value is based on a surrogate value. Part of the normal value calculation will include the financial expenses of a surrogate company or companies. These, of course, will reflect a non-subsidized interest rate. Consequently, the normal value used will not be lowered by the effect of the low-interest loan. However, the U.S. price will still reflect that passed-on cost savings. Therefore, when normal value is compared to U.S. price using an NME methodology, the effect of the subsidy is fully captured in the price comparison

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[5] Note that the same result would occur if the U.S. price were compared to constructed value, because that value would also incorporate the government-reduced financial expense ratio.

and reflected in the antidumping duty rate. If a petitioner were to seek the imposition of a CVD rate against the NME respondent for accepting a low-interest loan, it would effectively be seeking to punish the respondent twice for the same behavior. The NME methodology alone accomplishes the objective of eliminating the effect on U.S. prices of government intervention, whether characterized as subsidies or otherwise.

In the instant case, this becomes most obvious in relation to the allegations of subsidies on the inputs used to produce the finished CFS paper. If an unsubsidized surrogate value or imported value is used to construct normal value, any possible subsidy benefit reflected in normal value is eliminated. The subsidy benefit is already offset by the surrogate or imported value. Imposing a countervailing duty to reflect the subsidy to the input would result in double counting of the subsidy benefit.

In these circumstances, it should be obvious that the U.S. has a choice. Either designate a country as a market economy country or an industry as a market oriented industry and apply both antidumping and countervailing duties, or designate a country as a non market economy and the investigated industry as a non market oriented industry and be limited to the application of antidumping duties based on an NME methodology. As illustrated above, the two (i.e. application of an NME antidumping methodology and imposing countervailing duties) are mutually exclusive.

Article VI:5 of the GATT 1994 admonishes authorities not to assess antidumping and countervailing duties "to compensate for the same situation." While the reference is to double counting export subsidies, the objective is very clear: authorities must ensure that the same situation is not addressed by both antidumping and countervailing duties. Thus, in the case of export subsidies, authorities may either collect a countervailing duty to offset the effects of the

subsidies or allow them to be captured in the dumping calculation insofar as they operate to lower U.S. price. However, if a country imposes both a CVD rate that includes export subsidies and a dumping rate on the same product, it must adjust the rates (either by lowering the CVD rate or the AD rate by the amount of the export subsidy) to avoid the double-collection of duties for the same economic behavior.

The same concept of double-counting inherent in export subsidies also exists for the application of CVD duties to NME countries. However, because the NME methodology used to calculate normal value in effect offsets *all* subsidies instead of just export subsidies the imposition of a CVD rate to an NME country is completely redundant when an AD rate is also imposed. In other words, antidumping duties based on an NME methodology are mutually exclusive with countervailing duties. If authorities apply the NME AD methodology and CVD remedies to the same situation, in order to ensure a fair comparison under Article 2.4 of the Antidumping Agreement, "due allowance" must be made to ensure that the antidumping margins are offset by the amount of the countervailing duty in order to avoid double counting. Double counting obviously would be the antithesis of a "fair comparison." Furthermore, under Article 9.3 of the Antidumping Agreement, the duty imposed pursuant to an AD proceeding may not exceed the margin of dumping. In essence, this is a prohibition against over-collection of duties owed. However, if Commerce were to impose a CVD against China and also impose duties against China which account for the effect of *subsidization* the duty collected pursuant to the AD order would necessarily exceed the margin of dumping, in direct violation of Article 9.3. The U.S. has committed to implement its trade remedy laws fairly and without bias towards any WTO member-country. It should not depart from that obligation now.

Notwithstanding U.S. international obligations to make a "fair comparison" when imposing trade remedies, and in spite of the inevitable collection of duties in excess of the margin of dumping if both NME AD rates and CVD rates are imposed on the same imports, Commerce has stated it does not believe it has the authority under U.S. law to adjust for double-counting.[6] Commerce's position is particularly troubling in the context of the Coated Free Sheet Paper proceeding because the case involves a companion AD case that is being conducted pursuant to China's continued designation as an NME by Commerce. Essentially, Commerce has recognized that the virtual certainty that double-counting will occur, but has nevertheless noted that, in the event that it decided to impose a CVD against China, it will go so far as to knowingly impose this unfair double-imposition of duties retroactively to the respondents in that case. Without the authority to offset domestic subsidies to account for a non subsidized normal value, the imposition of both an NME-based AD duty and CVD duties against the same economic behavior would necessarily violate United States obligations under the WTO. Given that DOC has no authority to impose CVD's in an NME context pursuant to current U.S. law, embarking on a WTO-inconsistent practice would seem extraordinarily unfair, and plainly unnecessary.

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[6] Challenges and Choices to Apply Countervailing Duties to China, GAO-06-608T (April 4, 2005) ("Commerce lacks clear authority to make such corrections {for double counting} when domestic subsidies are involved. . . . U.S. law does not provide Commerce with any specific authority to avoid double counting in such situations. As a result, Commerce officials observed that the department would have no choice but to apply both duties without making such adjustments.")

IV. GIVEN THAT THE COMMECE DEPARTMENT HAS TAKEN THE POSITION THAT IT IS IMPOSSIBLE TO CALCULATE SUBSIDY BENEFITS IN NME COUNTRIES, IT SHOULD NOT PROCEED IN APPLYING THE COUNTERVAILING DUTY LAW TO COUNTRIES IT HAS DESIGNATED AS NME'S, INCLUDING CHINA, UNLESS IT CAN OVERCOME THIS IMPOSSIBILITY

The overarching purpose underlying the rulemaking provisions of the APA is to "improve the administration of justice by prescribing fair administrative procedure." Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946), *reprinted in* 1946 U.S.C.C.A.N. 228, 228").. Fair procedure is captured at its most basic in the related concepts of "notice" and "opportunity": notice that a party's rights may be affected by the propose rulemaking and an opportunity to comment on how the rule could be most fairly and effectively implemented.

This principle is particularly relevant here because DOC has admitted that it does not know how to determine whether benefits exist or to measure those benefits in a non-market economy country. Indeed, DOC has gone so far as to declare that the current definition of benefit is inapplicable to non-market economy countries. Given that the applicable CVD rates are determined from the amount of the benefit, DOC's admitted lack of a methodology as to whether or how to proceed in defining a subsidy in a non-market economy has enormous significance. The agency must amend its rules before proceeding haphazardly with a CVD case against China and making up the rules as it goes along.

The position that benefits cannot even be defined in a non-market economy is not simply an argument by counsel. This assessment represents the *Department's own conclusion* after considerable analysis. As far back as 1984, DOC decided that the CVD law could not be applied against NME countries for this very reason.

One of the key issues before the court of appeals in the *Georgetown Steel* case was the extent to which DOC would be able to measure the benefit of subsidies provided by an

NME government. The decision of the Court of International Trade suggested that DOC should be able to do this. In its brief to the CAFC, DOC vehemently attacked this aspect of the Court's decision:

> Indeed, the most ridiculous aspect of the decision below is that it concedes that ITA has the expertise when it comes to problems of measuring subsidies, [cite omitted], but rejects **ITA's documented assertions that it cannot measure subsidies in NMEs** in a realistic manner. Moreover, the decision does so without citation to any authority, and it expressly rejects the opinions of experts.

See Brief for Appellant (Commerce Department) submitted in *Georgetown Steel v. United States*, No. 85-2805 (Court of Appeals for the Federal Circuit) dated November 25, 1985 at p. 24.

The Commerce Department went on to state unequivocally: "[B]ecause NME enterprises are not profit maximizers, there is no basis upon which [the Department can untangle all of the various incentives and determine how much each is worth and to whom." *See* Reply Brief for the United States (Commerce Department) submitted in *Georgetown Steel v. United States*, No. 85-2805 (Court of Appeals for the Federal Circuit) dated February 11, 1986 at p. 11. Since that time, Commerce has affirmed this position consistently for over twenty years, citing again and again to its own precedent, *Georgetown Steel*, and later, to its own regulations to support its unwavering position that it has no means by which to measure or define "benefit" for a NME country.

Given these emphatic statements by the Department that defining and measuring benefits in a non-market economy is an impossible task it seems absurd that the agency is now willing to attempt this analysis in the context of an investigative proceeding with tight statutory deadlines. The APA's rulemaking requirements were intended to prevent just this situation.

V. THE CFS PAPER INVESTIGATION MUST BE TERMINATED BECAUSE ANY CHANGE TO THE DEPARTMENT'S 20 YEAR APPROACH CAN ONLY BE APPLIED PROSPECTIVELY

By proposing to apply a revision to it existing practice in an on-going proceeding, DOC's request for comments proposes to violate the future effect requirement of the Administrative Procedure Act." 5 U.S.C. § 551(4). Moreover, it is contrary to the basic legal concept of notice, which, among other things, requires that a prohibited action (here, alleged provision of countervailable subsidies) be defined so that a reasonable person can know what conduct is prohibited. See generally, Black's Law Dictionary, Third Pocket Edition (1996). In its request for comments, Commerce has admitted that it does not know, "whether the countervailing duty law should now be applied to imports from the PRC." Id. This statement highlights the illegality of Commerce's actions. "Those regulated by an administrative agency are entitled to know the rules by which the game will be played." *Alaska Professional Hunters Ass's* at 1035 (internal quotation and citation omitted).Commerce is plainly admitting that it does not know whether the rules against applying the CVD law to NMEs can or should be changed, but in the same breath is indicating its intention to apply whatever it decides retroactively in an ongoing proceeding.

The proposed retroactive application of the CVD law to an NME economy stands in stark contrast to DOC's own countervailing duty regulations, which indicate in the preamble that "{w}here the Department determines a change in status is from non-market to market economy is warranted, subsidies bestowed by that country after the change in status would become subject to the CVD laws." Notably, Commerce followed the "future effect" principle in a recent administrative decision when it found, "pursuant to the Preamble of the Department's regulations and case precedent," a benefit conferred prior to Hungary's graduation to market-economy status was, "not countervailable because {it} was made while Hungary was still considered to be an

NME." *Final Affirmative Countervailing Duty Determination: Sulfanilic Acid from Hungary*, 67 Fed. Reg. 60,223 (September 25, 2002) and accompanying Decision Memorandum at Comment 1. We are at a loss to explain Commerce's sudden willingness to violate the APA and ignore the basic legal rights of respondents to notice in the ongoing Coated Free Sheet Paper Case.

VI. THE MANNER IN WHICH THE DEPARTMENT OF COMMERCE HAS SOLICITED COMMENTS ON THIS ISSUE VIOLATES THE PROCEDURAL PROTECTIONS EMBODIED IN THE TARIFF ACT OF 1930.

Although Commerce's Federal Register notice requesting comments on the applicability of the CVD law to NMEs does not include a case number referencing the Coated Free Sheet Paper case, the notice nevertheless states that:

> The Department intends *during the course of the present investigation* to determine whether the countervailing duty law should now be applied to imports from The PRC. Given the complex legal and policy issues involved, the Department, therefore, invites public comments on this matter.

Application of the Countervailing Duty Law to Imports From the People's Republic of China, 71 Fed. Reg. 75507 (Dec. 15, 2006) (emphasis added).

Read in context with the rest of the notice, it is clear that this statement refers to the illegally initiated CVD proceeding currently underway against the People's Republic of China, notwithstanding the notice's non-case-specific title.

A. The Department Of Commerce's Request Violates The Statutory Limits On Participation In a Proceeding By Interested Parties As Well As The Statutory Limitation On When Parties May Comment On Initiation.

By publishing a general request for comments from all parties to be applied in a specific proceeding, DOC has violated the provisions of the Tariff Act limiting participation in ongoing proceedings only to interested parties. 19 U.S.C. §1677(9). Moreover, the statute specifically prohibits any parties other than the government pursuant to consultation to comment on any

aspect of initiation other than industry support. 19 U.S.C. 1671a(c)(4)(E). By requesting comments from the general public on the question of the application of the CVD law against China in a specific proceeding, which necessarily encompasses the initiation of that illegal proceeding, DOC is attempting an end-run around the statutory limitation to the contrary.

B. The Respondents In The Coated Free Sheet Paper Investigation Will Be Unfairly Prejudiced By Department Of Commerce's Consideration Of Arguments Raised By Non-Interested Parties, Outside The Scope Of That Proceeding

While DOC may have had the discretion to solicit comments on the applicability of the CVD law to China prior to initiating[7] the CVD case on coated free sheet paper, it cannot now unfairly prejudice the respondents in that case by applying comments not requested or submitted on the record of the ongoing proceeding against them. As Congress indicated when it limited communications regarding the question of initiation only to domestic interested parties of the merchandise subject to a petition,

> The committee intends that the standing requirements be administered to provide an opportunity for relief for an adversely affected industry and to prohibit petitions filed by persons with no stake in the result of the investigation.

S. Rep. No. 249, 96th Cong., 1st Sess. 63, *reprinted in* 1979 U.S. Code Cong. & Admin. News.

By requesting comments outside of the ongoing CVD proceeding which will be applied specifically against the respondents in that proceeding, Commerce has through it's "general" request for comments effectively opened that proceeding up to argument by any number of parties with no actual stake in the outcome. China is now faced in that case with the highly unorthodox task of having to answer arguments in the Coated Free Sheet Paper case that are not made on the record of the proceeding at hand, because Commerce has indicated that it intends to

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[7] 19 U.S.C. 1671a(b)(4)(B) states that Commerce shall not accept unsolicited communications from other than a domestic interested party when determining whether to initiate an investigation.

use those comments to make its decision in this case. This is clearly not what was envisioned by Congress when it placed statutory limitations on who may petition the Government in AD/CVD proceedings and who is an interested party in the proceeding.

VII. ABSENT NEW REGULATIONS, INITIATION OF A COUNTERVAILING DUTY INVESTIGATION AGAINST AN NME COUNTRY VIOLATES ARTICLE 14 OF THE SCM AGREEMENT.

Initiation in this case would also violate Article 14 of the Agreement on Subsidies and Countervailing Measures since DOC has in place no implementing regulations concerning the identification and measurement of benefit as defined by Article 14. As discussed above, when interpreting its own CVD regulations defining benefit, DOC made particular note of the importance of its non-application rule regarding non-market economies. In other words, DOC specifically indicated that the definition of benefit as currently codified does not apply to NMEs. Article 14, requires that the methodologies employed in measuring benefit "shall be provided in the national legislation or implementing regulation of the Member concerned." Absent such regulations, the application of the countervailing duty law to NMEs would be inconsistent with U.S. obligations under Article 14.

CONCLUSION

The Department of Commerce lacks the legal authority to conduct a countervailing duty investigation against a country that it has determined to be a non-market economy. Even if, contrary to legal precedent and legislative history, the Department determines that it has the statutory authority to conduct a countervailing investigation against a non-market economy, the Department still must, pursuant to the APA, provide notice and an opportunity to comment on its intention to change its existing rule. Commerce has held the CVD law and regulations to be

inapplicable to non-market economy countries for over two decades. It is improper to change such a long-standing rule in the context of an ongoing investigation, particularly when such a change may be based on comments from parties that are not interested parties to that investigation. Finally, it is inappropriate for the Department to proceed with a countervailing duty investigation against a non-market economy until it has determined how to avoid the double counting of subsidy benefits inherent in overlapping antidumping and countervailing duty cases where an NME methodology is used. Simply put, in order for DOC to be able to act on a CVD petition, Congress must first act to grant the agency that authority. Until that time, the countervailing duty investigation of *CFS Paper from China* should be terminated immediately and all future CVD petitions against countries deemed as NMEs should be rejected.